No. 91-33

Supreme Court, U.S.
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In The Supreme Court
OF THE
United States

OCTOBER TERM, 1991

LEONARD CASTIGLIONE, ANTHONY DONATO,
and WILLIAM HENDRICKS,
Petitioners,

vs.

JACK LEE HARRIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

(1) Is it proper to deny a motion for summary judgment predicated upon a claim of qualified immunity in a case arising under 42 U.S.C. § 1983, where, at the time the Defendants wrongfully terminated the plaintiff public employee, the law clearly prohibited public officials from firing employees for exercising their First Amendment rights and where, in any event, there existed important questions of fact regarding the Defendants' motives for firing the public employee?

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STATEMENT OF THE CASE

This case arises out of the termination of Respondent Jack Lee Harris from the Pittsburgh Police Department by Defendant Petitioners on May 11, 1985. Harris was terminated on the pretext that he violated the "chain of command" when he confidentially reported to the district attorney his discovery of cocaine above the locker of a fellow officer in the department.

On April 21, 1986, Harris filed an action in the United States District Court for the Northern District of California alleging claims for violation of 42 U.S.C. section 1983 and pendent state claims for wrongful termination and breach of the implied covenant of good faith and fair dealing.

On September 26, 1986, a labor arbitrator in a related state court arbitration proceeding found, inter alia, that (1) at the time of his discharge, Harris was an employee of exemplary standing; (2) Harris had adequate grounds to mistrust that the Chief of Police would investigate the discovery of police misconduct; (3) Harris' conduct "in speaking out and in his going to the district attorney ... falls within the protection enunciated by the highest court in the Mount Healthy case"; and (4) "the totality of the conduct of the department in this matter does not speak well for it as a source of credible and factual data." (Respondent's Appendix B at pp. B-2-3.)

After previously filing an unsuccessful motion for summary judgment on the merits of the case in the Summer of 1987 (Respondent's Appendix A.), Petitioners filed a "self-styled" motion for summary judgment raising the qualified immunity defense for the first time on September 3, 1987, just days before trial. The district court orally denied the purported motion at the Pre-Trial Conference on the ground that the law regarding the protected character of First Amendment speech was well established in 1985 and on the ground that the motion raised disputed fact questions that made summary judgment inappropriate. Because the district court did not believe that the motion properly constituted a motion for summary judgment, it did not issue a written opinion denying the motion. After the Ninth Circuit stayed the trial it granted a writ of mandate directing the

district court to issue a written order granting or denying summary judgment. On July 9, 1989, the district court filed an exhaustively researched and carefully reasoned opinion in which it characterized Petitioners' affidavits as "uniformly conclusory." In that order the district court referred to its previous written order delaying summary judgment in which it had found that the "subject matter of Harris' disclosure was of great public interest" and, that Harris had properly taken "his concerns to the appropriate external authorities," and after careful examination of Harlow v. Fitzgerald, 457 U.S. 800 (1982) and related cases, held that the law prohibiting such termination was clearly established at the time of Harris' firing and that the motion was procedurally deficient and legally unsound. (Petitioners' Appendix A.)

Petitioners appealed the district court's denial of the motion for summary judgment. The Ninth Circuit affirmed the district court's denial of summary judgment, however, under Harlow v. Fitzgerald, 457 U.S. 800, and Mitchell v. Forsythe, 472 U.S. 511 (1985), holding that the law prohibiting termination of public employees for expression of First Amendment rights has long been clearly established and that issues of fact existed with regard to Petitioners' motives and pretexts for effecting the termination.

REASONS FOR DENYING THE WRIT

I.

The Ninth Circuit Opinion Did Not Conflict with the Standards Established In Harlow v. Fitzgerald and Its Progeny

A. Introduction

In Harlow v. Fitzgerald, this Court restated the qualified immunity doctrine as an objective test:

> ... government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

In Harlow, this Court thus provided a standard by which courts could consider constitutional claims and, through the qualified immunity defense, allow public officials to avoid unnecessary "burdens of broad-reaching discovery", and "permit the resolution of many insubstantial claims" at the earliest possible time in the litigation. Id. at 817-818. Following the Harlow decision, this Court further explained that where a plaintiff alleges a violation of a clearly established law and the evidence reveals a genuine issue of material fact as to whether the defendant committed the acts alleged, the qualified immunity defense fails. Mitchell v. Forsythe, 472 U.S. at 526.

Adhering to the principles announced by this Court, the district court and the Ninth Circuit correctly determined in this case that both the clearly established law and the existence of disputed facts precluded summary judgment on grounds of qualified immunity.

B. The Ninth Circuit Properly Relied on Cases Which Established That Clearly Established Law Prohibited Termination of Public Employees in Retaliation for Exercise of First Amendment Rights

It is indisputable that the law was clearly established prior to 1985 that the termination or demotion of a public employee in retaliation for the exercise of First Amendment rights was unconstitutional. See Mount Healthy City School Dis. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Perry v. Sindermann, 408 U.S. 593, 596-597 (1972); Unruh v. City Council, 78 Cal. App. 3d 18, 29 n.6 (1978); Obrien v. Town of Caledonia, 748 F.2d 403 (7th Cir. 1984); Brockell v. Norton, 732 F.2d 664 (8th Cir. 1984); Meester v. Davies, 11 Cal. App. 3d 342 (1970); Czunlaniz v. Albanese, 721 F.2d 98 (3rd Cir. 1983); Schwartzman v. Valenzuela, 866 F.2d 1209 (9th Cir. 1988); McKinely v. City of Elroy, 705 F.2d 1110 (9th Cir. 1983); Manhattan Beach Police Officers v. Manhattan Beach, 881 F.2d 816 (9th Cir. 1989); Brawner v. City of Richardson, Texas, 855 F.2d 187 (5th Cir. 1988); Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989).

Respondent Harris' claim that he was dismissed from the Pittsburg police force in February, 1985, in retaliation for confidentially reporting suspected criminal activities of other members of the police force to the Office of the District Attorney clearly falls within this class of proscribed conduct. Harris' claim that he was fired for exercising his First Amendment rights, moreover, is nothing like a bare allegation that could not withstand judicial scrutiny. Both the arbitrator (whose 43 page written opinion was introduced into evidence on the motion for summary judgment as Exhibit A to Plaintiff's Opposition) and the district court found that the conduct for which Harris was fired directly implicated important First Amendment concerns. Indeed, after hearing twenty-three witnesses over a five day trial-like hearing, the arbitrator concluded that Harris' conduct, "in speaking out ... and in going to the district attorney falls within the protection enunciated by the highest court in the Mt. Healthy case." (Respondent's Appendix B, at p. B-3.) The district court, after careful review of this and other abundant evidence, likewise found that "the subject matter of [Harris] disclosure was of great

public interest and cannot be considered to have been dominated by the co-existing private concern, i.e. [Harris'] retention of his employment." (Respondent's Appendix A at p. A-9.)

Given such findings, it is clear that the Ninth Circuit opinion in this case is perfectly in accord with the principles established by this Court and followed by many, many federal precedents prior to Harris' unconstitutional termination in 1985.

C. The Ninth Circuit Correctly Determined That Questions of Fact Precluded Summary Judgment in This Case

Defendants' primary defense to Harris' section 1983 claim itself raised issues of disputed fact. Defendants admit that Harris found cocaine in the locker room and concede that Harris confidentially reported it to the District Attorney (rather than to the press or the public). They contend, however, that contrary to appearances, they terminated him for "violating the chain of command," not for exercising his First Amendment rights. Thus, Harris' section 1983 claim, like other such cases based upon a theory of unconstitutional retaliatory dismissal almost inevitably do, raised important questions of motive or intent. Indeed, decisions of this Court have expressly acknowledged that such questions are inherent in First Amendment cases.

In Mount Healthy City School Dis. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), for example, the Supreme Court held that a plaintiff alleging retaliation for the exercise of constitutionally protected rights must show that the protected conduct was "a substantial" or "motivating" factor in the defendant's decision. 429 U.S. at 287. Thereafter, the burden shifts to the defendant to establish that it would have reached the same decision regardless of the protected conduct. Id.

Thus, in First Amendment cases like the present one, the Defendants' motive or purpose for terminating the public employee can be critical. In light of such analysis, the Ninth Circuit has held that where a genuine issue of fact exists with regard to the motivation and intent for the alleged retaliatory termination of a public employee, summary judgment on

qualified immunity grounds is improper. Allen v. Scribner, 812 F.2d 426, 436 (9th Cir. 1987); Sorrano's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1319 (9th Cir. 1989). Clearly such holdings, strictly limited as they are to the First Amendment termination cases where often the entire action rests upon whether the stated reason for termination is real or merely pretextual, do not conflict with the standard set forth in Harlow and its progeny.

Because Respondent's section 1983 claim falls within this special class of cases in which the law clearly prohibited the alleged conduct and the element of motivation or intent must be decided by a jury, the Ninth Circuit properly upheld the district court's denial of summary judgment on qualified immunity grounds in this case.[1]

II.

Petitioners' Additional Claims That The Ninth Circuit Otherwise Erred in Upholding the District Court's Denial of Petitioners' Motion for Summary Judgment Do Not State Adequate Grounds For Certiorari and, In Any Event, Are Without Merit

Petitioners' additional claims that the Ninth Circuit (1) failed to apply the proper test in determining whether the law was clearly established at the time of Respondent's dismissal; (2) failed to consider Petitioners' reliance on the advice of counsel as relevant to the issue; and (3) failed to consider the

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[1]Significantly, this Court already has denied a petition for writ of certiorari in Tribble v. Gardner, 860 F.2d 321 (9th Cir. 1988), cert den. Gardner v. Tribble, 490 U.S. 1075 (1989), in which petitioners raised the issue of whether the Ninth Circuit properly rejected the qualified immunity defense in a section 1983 case based upon conduct allegedly motivated by an improper purpose. Thus, contrary to Petitioners' assertions in this case, it is clear that this Court considers the similar issue raised in the instant petition settled and inappropriate for review on certiorari.

issue with respect to specific circumstances surrounding one of the several public officials named in this suit fall outside the parameters of those issues which this Court will review on certiorari and, in any event, are without merit.

Generally, the jurisdiction of the Supreme Court on writ of certiorari extends to the review of conflicts in decisions reached between the federal and state courts, among the federal circuit courts, or between the federal circuit courts and this Court. Supreme Court Rule 17. No conflict exists, and, indeed, Petitioners allege no such conflict, among the federal circuit courts on the issue of the applicability of the qualified immunity defense in cases involving allegations under 42 U.S.C. section 1983. Further, contrary to Petitioners' assertion, no conflict exists between this Court's decision in Harlow, and the Ninth Circuit decisions in Allen and Sorrano's Gasco. Accordingly, certiorari is inappropriate in this case.

Even if this Court finds that these issues meet the procedural prerequisites for certiorari, however, they are entirely without merit. Indeed, to argue that the Ninth Circuit failed to conduct the balancing test established in Pickering v. Board of Education, 391 U.S. 563 (1968), is especially ludicrous. In its prior order, denying summary judgment from which these Defendants never appealed, the district court carefully balanced the relevant factors and concluded that Harris' report to the District Attorney was protected by the First Amendment. (Respondent's Appendix A.)

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: July 17, 1991

Respectfully submitted,

CARROLL, BURDICK & McDONOUGH

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APPENDIX A

In the United States District Court
Northern District of California
No. C-86-2101 MHP

Jack Lee Harris,
Plaintiff,

vs.

City of Pittsburg, et al.,
Defendants.

(Filed August 12, 1987)

ORDER

PATEL, United States District Judge.

The complaint herein states claims under 42 U.S.C. § 1983 for violation of first amendment rights, alleging that Sgt. Jack Harris was fired because he spoke out against the corruption and favoritism that plagued the Pittsburg Police Department. Harris further alleges that his equal protection rights under the fourteenth amendment were violated because he received disproportionately harsh discipline for his asserted deviation from Department rules while others who had acted similarly or had engaged in more serious misconduct received little or no discipline. The complaint also alleges causes of action for wrongful discharge in violation of the covenant of good faith and fair dealing because defendants' termination of Harris was in bad faith and violative of public policy.

During oral argument on July 20, 1987, plaintiffs stipulated that they would voluntarily dismiss defendants Aaron Baker, Joseph Porter and Ted Gargalikis. Plaintiffs also agreed to dismiss their fourth amendment claims; they conceded, moreover, that Ninth Circuit case law bars their ninth amendment and fifth amendment claims. See, respectively, Strandberg v. City of Helena, 791 F.2d 744 (9th Cir. 1986), Johnson v. Barker, 799

F.2d 1396, 1399 n.1 (9th Cir. 1986). The remaining defendants, the City of Pittsburg, Leonard Castiglione, Anthony Donato, James Banks, William Hendricks and David Millecam now move the court to enter an order granting summary judgment to defendants on the remaining grounds:

(1) The facts establish there was no violation of any first amendment rights;

(2) The facts show no violation of due process rights;

(3) The statute of frauds bars plaintiff's eighth cause of action;

(4) No cause of action is stated against plaintiff's fellow employees in the ninth and tenth causes of action;

(5) The facts show no breach of the covenant of good faith and fair dealing.

After careful consideration of the papers and oral argument, the court denies defendants' motion in part and grants defendants' motion in part.

I. Factual and Procedural History

On April 21, 1986, plaintiff Harris filed a complaint with the court alleging that defendants violated plaintiff's civil rights in terminating his employment with the Pittsburg Police Department. Plaintiff was a sworn member of the City of Pittsburg Police Department for approximately 16 years at the time of his discharge on May 10, 1985. Plaintiff was allegedly fired from his position as police officer for not following the proper procedure when he discovered cocaine on top of the locker of a fellow police officer.

The events which led to the firing of Sgt. Harris began on February 15, 1985 when a fellow police officer, Carl Webb, notified supervisor Harris that he had found a small white packet in a box that was on top of a locker in the department's locker room. Harris took charge of the packet, which was later

determined to contain cocaine. Later that morning Harris made contact with the Contra Costa District Attorney, and, on that same day, submitted the packet and a report thereon to the District Attorney's investigator, Alan Sjostrand. Harris was asked by the District Attorney to keep the matter confidential. Neither Harris nor Webb made a further report of the incident to the Pittsburg Police Department's higher officials.

The District Attorney's staff initiated an immediate investigation of the matter and notified the Chief of Police, Leonard Castiglione, of the case. Upon receiving the District Attorney's report in March 1985, a further City investigation was effected which resulted in the discipline of Officer Webb with a two day suspension and the termination from employment of Sgt. Harris.

Defendants argue that Harris willfully violated both City Civil Service Rules and Police Department Rules and Regulations in the manner in which he responded to this crime. They assert that by Harris' reporting the matter directly to the Contra Costa County District Attorney's office, Harris knowledgeably and willfully circumvented the chain of command, and did so knowing he was violating the Department's Rules and Regulations.

Defendants also argue that Harris was negligent in his conduct in that he failed to secure the scene of the crime, to properly handle the suspected contraband, and to otherwise properly investigate the matter. Defendants further allege that in reporting this matter to the District Attorney, Harris made serious irresponsible accusations against both subordinate and superior officers.

The City asserts, based upon these allegations, that Harris is no longer suitable for employment as a police officer, even though his tenure in the department spanned 16 years during which time he received only one written reprimand. Of 22 performance evaluations, 15 were of "exceeds requirements" standing, and five were "meets requirements" standing.

It is Harris' position that his confidential report to the District Attorney's office on February 15th was a course of conduct protected from retaliatory discipline. Harris argues that he had to avoid proceeding through the internal affairs process because his superiors, some of whom are the defendants in this action, are involved in a corrupt conspiracy within the police department. Harris alleges that his termination was prompted not so much by his actions in this matter, but because he is not one of police chief Castiglione's "boys." Harris explains further that Castiglione intensely disliked Harris' forthright participation in the KRON-TV series in late 1982 which addressed charges of corruption, mismanagement, and favoritism within the Department.

In the spring of 1986, prior to proceeding with the instant complaint, Harris pursued an administrative appeal of his termination through an arbitration proceeding conducted under the Civil Service Rules of Defendant City of Pittsburg. After a five day arbitration at which 26 witnesses appeared, the arbitrator found that "Sgt. Harris knew his job and always performed it professionally and at times even too zealously and thereby not always pleasing the top command." Voluntary Arbitration In the Matter of Arbitration Between City of Pittsburg and Sergeant Jack Harris, State of California C.S.M.C.S. Case No. 841786, ("Arbitrator's Report"), September 26, 1986 at 32. The arbitrator further found that:

> [t]he various instances of very limited or no discipline meted out by the Chief [Castiglione] to officers found to have committed serious acts of misconduct . . . reflect a fact of life in the Department that anyone working there must take to mean that if you're on the Chief's side you can get off easy on disciplinary raps, but if you're not, you had better watch out. The favoritism and lack of even-handed justice is reflected in the repeated incidents detailed by Sgt. Harris and not effectively rebutted by the City.

Arbitrator's Report at 35.

The arbitrator further found that Harris' fear of going through departmental channels was realistic. Having considered the testimony of all parties the arbitrator found that

> Sgt. Jack Harris had adequate grounds to mistrust the Chief. Harris had observed first hand the way members of the force who were close personal and political friends of the Chief had been let off with either no discipline at all or very light disciplinary actions, so he acted as he did. Harris knew of the criminal conduct of some officers, of the filing of false criminal information by at least one other officer, of the meaningless discipline meted out to the officer to whom a woman had reported the threat of rape and who told the woman "... you might enjoy it", [sic] . . . of the conduct of Lt. Millecam in that officer's making certain that a personal friend was not arrested for a felony drunk driving charge. . . .

Arbitrator's Report at 37-8.

The arbitrator analyzed not only the favoritism existing in the Pittsburg Police Department under Castiglione, but also the particulars surrounding the finding and handling of cocaine at the police station when Harris was on duty.

> The City makes a great deal of the lack of protection of the crime scene in the Department's locker room on February 15 by Sgt. Harris. First the initial scene of the crime was discovered by Officer Webb and witnessed by Officer Riggenberg and for over two hours they were the ones to establish control of the crime scene and did not do so; second, it is seriously questionable whether a locale such as a police officer's locker room can (or should under these circumstances) be sequestered as an out-of-bounds area. To do so would have immediately tipped anyone involved in any potential or actual criminal activity and in view of the history of events in this

> Department I cannot fault Sgt. Harris for not acting in accordance with the Rules to protect this scene of the crime.

Arbitrator's Report at 39.

Given the foregoing, after hearing the testimony and considering the written submissions in this case, the arbitrator reduced Harris' termination from employment to a suspension of one calendar week and ordered, in addition, that Harris be fully reinstated to his former position and made whole for any loss of pay and benefits suffered as a result of the action taken against him. Arbitrator's Report at 43. While the arbitrator authorized a five-day suspension for Harris' technical violation of Department rules, the arbitrator concluded that Harris had been subjected to discriminatory and retaliatory discharge in violation of his first amendment rights. Arbitrator's Report at 42.

Despite the finding of the arbitrator, defendants seek summary judgment as to all claims and all parties, arguing, on the basis of uniformly conclusory affidavits, that Harris' confidential report to the District Attorney regarding the discovery of cocaine in the police locker room was disruptive to the Pittsburg Police.

II. Legal Standard

Summary judgment is appropriate only if there are no disputed genuine issues of material fact. Fed. R. Civ. P. 56(c); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 882 (9th Cir. 1980). In evaluating whether the granting of summary judgment is proper, the evidence must be viewed in a manner most favorable to the plaintiff. Gaines v. Haughton, 645 F.2d 761, 769 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982).

The court, viewing the evidence in this light, holds that a fair resolution of the issues raised in this case requires a full trial on the merits, especially as it is well established that summary judgment is generally improper in cases where the termination of a public employee implicates constitutional issues: "[w]here the employer's explicit justifications for dismissal arguably implicate

constitutionally protected rights, summary judgment is particularly inappropriate." Peacock v. Duval, 694 F.2d 644, 647 (9th Cir. 1982).

In this case, summary judgment must be denied in part and granted in part for the reasons set forth below.

A. First Amendment Claims

Defendants' motion for summary judgment as to Harris' claims that defendants violated his first amendment rights must be denied because defendants are required to demonstrate by a preponderance of evidence that the decision to terminate Jack Harris would have been reached even if Harris had not engaged in constitutionally protected conduct. Id. at 645.

Merely because Harris' speech may have had the effect of "irritating or even harassing" certain members of the police department "does not mean that such speech is stripped of its First Amendment protection." Id. at 647. Nor is it possible to strip him of that protection because some of his speech "may have been 'falsely critical'." Id.

Sgt. Harris had the right to speak out and he did so; the United States Supreme Court has affirmed this. See e.g., Pickering v. Board of Education, 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983). Other courts have also found that "policemen, like teachers and lawyers are not relegated to a watered-down version of constitutional rights." Kannisto v. City and County of San Francisco, 541 F.2d 841, 843 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977). A police officer's right to first amendment protection is "substantial because, as a member of the department, he is a person 'extraordinarily able to inform the public of deficiencies in this important governmental department.'" Id. (quoting Pickering v. Board of Education, 391 U.S. at 572). While courts have also placed limitations on individuals' expressions, e.g., as in Pickering v. Board of Education and Connick v. Myers, Sgt. Harris' conduct is not affected by such restrictions. The United States Supreme Court in Pickering clearly states that "a balance between the interests of the

[employee], as a citizen, . . . and the interests of the State, as the employer, . . ." must be struck. 391 U.S. at 568.

The balancing test enunciated in Pickering cannot ordinarily be resolved by summary judgment because the legitimacy of the employer's concern with disruption, and the sincerity of his articulated motive for taking punitive action, are simply not susceptible to summary disposition.

Contrary to defendants' argument, the Supreme Court's decision in Connick affirms that Harris' claims are best decided at trial, not on summary judgment. As the Court pointed out: "[t]he inquiry into the protected status of speech is one of law, not fact." 461 U.S. at 148, n.7. To be clear,

> [w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.

Id. at 1690. Plaintiff has made a strong showing that the communication here was on a matter of public concern. Thus, the defendants' burden in justifying their actions is substantial and requires a full factual inquiry in order to assess and balance the competing interests.

In addition, there is precedent that the breach of the chain of command by a confidential report to an investigative agency is entitled to be protected under the First Amendment. In a factual context virtually identical to the present case, the Eighth Circuit held that a "private call to an authority positioned to make quick investigation and resolution" of alleged improprieties within a police department is protected. Brockell v. Norton, 732 F.2d 664, 668 (8th Cir. 1984). Where there was "unlikelihood of proper resolution of the matter if kept in the chain of command," id. at 667, the enforcement of the chain of command rule "against an employee seeking to criticize the very superior empowered to review [the matter at hand] would imper missibly chill first amendment rights." Id. at 668 (quoting Atcherson v. Siebenmann, 605 F.2d 1058, 1063 n.5 (8th Cir. 1979)). The Third Circuit has made a similar point: "[al policy which could compel

public employees to route complaints about poor departmental practices to the very officials responsible for those practices would impermissibly chill such speech." Czurlanis v. Albanese, 721 F.2d 98, 106 (3rd Cir. 1983).

In O'Brien v. Town of Caledonia, 748 F.2d 403 (7th Cir. 1984), the court granted a preliminary injunction against retaliatory discipline imposed upon a police officer who communicated his concerns about irregularities to his own attorney, the District Attorney, the local judiciary, and the FBI, in violation of a departmental rule requiring officers to keep such matters confidential, stating:

> while we do not wish to encourage disobedience in public employees, neither can we permit a governmental body to insulate itself from public scrutiny by declaring all its official business to be confidential.

Id. at 407. This court finds that like O'Brien, Harris "took his concerns to the appropriate external authorities and any disruption caused thereby must be accepted as incidental." Id. Moreover, "the subject matter of [Harris'] disclosure was of great public interest and cannot be considered to have been dominated by the co-existing private concern, i.e., [Harris'] retention of his employment. Id. at 407-08.

Similarly, in Unruh v. City Council, 78 Cal. App. 3d 18 (1978), the court concluded that confidential disclosures by a police officer which are not made recklessly or in bad faith are protected as a matter of law. Id. at 29, n.6. Indeed, where an officer suspects that there is wrongdoing which may involve his superiors, it is his duty to report to the District Attorney:

> it is the duty of a police officer to investigate suspected wrongdoing in the city, whether it be that of a citizen or of the chief of police, and where the chief is involved it is the officer's duty to deliver any evidence he obtains to the district

> attorney or the Attorney General; he certainly cannot be expected to give it to the chief.

Meester v. Davies, 11 Cal. App. 3d 342, 346 (1970).

B. Fourteenth Amendment Claims

Plaintiff argues in his opposition to summary judgment that his rights to equal protection were infringed upon when he received disproportionately harsh discipline. However, plaintiff has not pleaded an equal protection violation.

Plaintiff's second amended complaint, drafted by an attorney no longer representing plaintiff, originally pled that Harris, a white male, was the victim of class or racial discrimination. The court rejected this theory of liability, declining to find Harris the member of any protected class. Accordingly, plaintiff's claim under 42 U.S.C. § 1985 was dismissed.

Plaintiff's present pleading gives no notice of any claim that plaintiff's rights to equal protection were infringed upon. Harris' current civil rights causes of action are limited to 42 U.S.C. § 1983. Plaintiff specifically enumerates in paragraph 45 of his complaint, his first § 1983 cause of action, plaintiff's constitutional rights which were allegedly violated by the defendants. Those rights are: (a) the first amendment right to speak freely; (b) fourth and ninth amendment rights to be free from interference; and, (c) the right not to be deprived of life, liberty, or property without due process of law under the fifth and fourteenth amendments. Denial of equal protection is not asserted. Nevertheless equal protection is briefed and argued by all parties to the motion.

The equal protection clause does not require "absolute equality," Douglas v. California, 372 U.S. 353, 357 (1963), nor does it require that all persons be dealt with identically, Baxstrom v. Herold, 383 U.S. 107, 111 (1966). It does not prevent the state from treating persons differently based on factual differences between them, but rather is intended to prevent purposeful discrimination without rational justification. Mobile v. Borden, 446 U.S. 55 (1980).

In this case, Harris received disproportionate punishment for his alleged misconduct while others, whose conduct was far more egregious, were sometimes not even subject to internal affairs interrogations, and, in some cases, were not disciplined at all, or received only slight punishment. Defendants neither discuss nor explain the instances of disparate punishment, despite the arbitrator's findings that disparate treatment occurred. Arbitrator's Report at 34-5, 37, 41.

Disparate treatment of similarly situated individuals violates the equal protection clause unless the government entity can prove that such distinctions have a rational basis:

> if distinctions between similarly situated individuals are to withstand an equal protection analysis, such distinctions must be reasonable, not arbitrary. . .

Zeigler v. Jackson, 638 F.2d 776, 779 (5th Cir. 1981). The Eleventh Circuit has written similarly:

> even an isolated event may contravene the equal protection clause if different action is taken against persons similarly situated without showing any rational basis for the disparate treatment.

Smith v. State of Georgia, 684 F.2d 7291 736 (11th Cir. 1982).

A significant showing has been made that the decision to terminate Harris did not conform to due process and equal protection, but rather to the Department's own practice of favoring the political and personal supporters of the police chief. See Arbitrator's Report. In reviewing the complaint drafted by prior counsel, and the papers submitted in this case since the initial complaint was filed, the court finds that it will not prejudice defendants to allow plaintiff to amend the second amended complaint according to the theories already propounded in this case under the equal protection doctrine. Defendants will not be prejudiced by this course; defendants have responded to papers up to and including this point in the litigation under equal protection theory. Accordingly, the court orders that any

amendments so filed must be in accordance with the theories raised heretofore, and that such amendments must specify the damages for which, under an equal protection theory, plaintiffs hope to recover.

C. Pendent State Claims

Summary judgment as to Harris' pendent state claims of wrongful termination are also denied because the termination appears to have violated public policy.

1. Harris' Eighth Claim

Defendants maintain that Harris' claim for wrongful discharge should be dismissed because it is barred by the statute of frauds. Defendants rely on the fact that the complaint alleges that Harris was hired pursuant to an oral contract, which is not enforceable if the employment was intended to last longer than one year. See Complaint, at ¶ 79. In the present case, Harris could not be discharged in the absence of good cause under the City of Pittsburg Civil Service Rules, Rule XIV. As such, Harris was a permanent employee and can bring an action for breach of contract upon proof that he was terminated without good cause.

The sole case cited by defendants in support of dismissal on the grounds that enforcement of Harris' contract is barred by the statute of frauds, Newfield v.Insurance Company of the West, 156 Cal. App. 3d 440 (1984), has been rejected by the Court of Appeals for the Ninth Circuit as "not representative of California law." See Eisenburg v. Insurance Company of North America, 815 F.2d 1285, 1291 (9th Cir. 1987). Therefore, both the factual and legal bases of defendants' motion for summary judgment on this ground are fallacious and the motion is denied.

2. Harris' Ninth and Tenth Claims

Harris argues he was terminated in accordance with the department's policy and practice "of shielding and protecting from criminal and civil liability certain supporters of the Chief of Police and other city officials." Complaint at 19. As such, his

termination violated the public policy of impartial and thorough investigation of suspected criminal misconduct by officials.

Harris' claim of wrongful termination is also predicated upon defendants' violating the covenant of good faith and fair dealing, and that they fired him without probable cause in a selective and discriminatory manner. The complaint details allegations of favoritism within the department. Complaint, at ¶¶ 21 & 20, 27, 31, 32, 33. These allegations have been substantiated by the Arbitrators's Opinion and Award which, although not controlling in this court, is admissible in evidence in this action. McDonald v. City of West Branch, Michigan, 466 U.S. 284 (1984).

Moreover, the Court explains that:

> [w]here an arbitral determination gives full consideration to an employee's..... rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record.

Id. at 292-93 n.13 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974)). Summary judgment on these counts is therefore denied.

3. Harris' Claim of Bad Faith against Defendants Porter and Millecam

It is not clear whether, in paragraph 90a of his complaint, Harris is stating a cause of action for bad faith against defendants Porter and Millecam, whom he alleges failed to assess his performance accurately. In the event that Harris is attempting to state such a claim, the court must disallow it. Fellow employees are not parties to the contract between the employer and the employee, and, as such, they cannot be liable for an alleged breach of any covenant or duty implied by the contract. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 581 (1973); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 456 (1980).

In sum, defendants may not avoid a trial on the issues in this case as the record before the court presents genuine issues of material fact regarding defendants' motives for terminating Harris. These issues may not properly be resolved on summary judgment. Therefore, the court, having considered the arguments of counsel and being fully advised as to the issues, denies in part and grants in part the motion for summary judgment by defendants City of Pittsburg, Leonard Castiglione, Anthony Donato, James Banks, William Hendricks and David Millecam.

III. Motions to Strike and for Sanctions

The parties have made counter-motions to strike certain evidence. As indicated from the bench, the evidence targeted by the motions is either admissible or appropriate for consideration on summary judgment. The bench ruling as made on the record will therefore not be addressed here, save two. One set of exhibits attached by plaintiff consisted of boilerplate declarations. The court had admitted them, but has given them little weight because they are nearly identical and do not appear to represent the thoughtful, individual statements of the declarants. Another exhibit objected to was the record of the arbitrator. The findings of a factfinder such as an arbitrator may be admissible if the proceeding has the indicia of trustworthiness. See McDonald v. City of West Branch, Michigan, 466 U.S. 284 (1984). The record before the arbitrator in this case is thorough. The witnesses were placed under oath. An opportunity for defendants to cross-examine was available. The arbitrator's findings were detailed and supported by the record. The court finds they are properly admissible.

Given the disposition of the claims above, and the reasons the court has given therefor, the motion for sanctions is accordingly denied.

>HarrJ1\P.5
DTR:cab

APPENDIX B

Voluntary Arbitration
State of California C.S.M.C.S. Case No. 841786

In the Matter of Arbitration
Between

City of Pittsburg
and
Sergeant Jack Harris.

ARBITRATOR'S OPTION AND AWARD

Representing the City of Pittsburg:

RICHARD C. BOLANOS, ESQ.
Whitmore, Kay & Stevens
145 California Avenue, #204
Palo Alto, California 94306

Representing the grievant, Sgt. Jack Harris:

MICHAEL L. RAINS, ESQ.
Carroll, Burdick & McDonough
One Ecker Bldg., Suite 400
San Francisco, California 94105

This matter was heard on the dates of March 12, 13, 14, April 7 and 8, 1986 in Concord, California. The Arbitrator, Julius N. Draznin, was chosen by the parties from a panel of arbitrators submitted to it by the Department of Industrial Relations, Mediation and Conciliation Service, State of California....

[Arbitrator's Opinion at pages 2 through 40 omitted]

CONCLUSION AND FINDINGS

There is no doubt in my mind from this record, the credible testimony, the evidence and the arguments that Sgt. Jack

Harris was technically guilty of violating the Department's Rules in going outside the chain of command on February 15, 1985 in his contacting the District Attorney's office (whose personnel were fully cooperative throughout this hearing and one of their investigators appeared as a witness) and not filing any report or other notice with his own Department. The question is whether the discipline enforced here in the light of this record is a proper one.

The disciplines meted out to other officers for misconduct in at least as serious misconduct, and I agree with counsel for Sgt. Harris even far more serious than Harris' conduct here, was at the most a thirty day suspension for an officer submitting a false college transcript. Other serious offenses such as Lt. Millecam's misconduct of falsifying reports, of suppressing a felony drunk driving crime resulted in a ten-day suspension, and other serious misconduct resulted in similar or even lesser disciplines. The Chief may not like Sgt. Harris but that does not give him license to discharge him based upon this record.

The totality of the conduct of the Department in this matter does not speak well for it as a source of credible and factual data from which it might be expected to act in a fair and even handed manner towards all of its personnel.

I have duly noted the various citations offered by each side but I find no need to dissect and explore each of them in this case.

Sgt. Harris had the right to speak out and he did so, the U.S. Supreme Court has affirmed this. While courts have also placed limitations on individuals' expressions as in the Pickering case (391 U.S. 563), and the Unruh case (78 Cal. 3d), and the Connick case (461 U.S. 138), I do not see that Sgt. Harris' conduct here is affected by such restrictions. The grievant's activity in his leadership of the Benefit Association is certainly not one that is circumscribed by any decisions I have read or that have been brought to my attention. The U.S. Supreme Court in the Mt. Healthy City School case (429 U.S. 274, 282) clearly states that a "balance must be struck between the interests of the (employee) as a citizen...and the interests of the State, as the

employer..." Sgt. Harris' conduct in his speaking out and in his going to the District Attorney under all of the circumstances present in this case falls within the protection enunciated by the highest court in the Mt. Healthy case.

I appreciate the sense of unease that Chief Castiglione may feel from time to time having Sgt. Harris on his staff but that is no excuse for him to apply the ultimate industrial punishment of termination of employment as he has here.

Sergeant Harris stated that he believed he could work in the Department, for the community and for the Chief. His record shows he has done that for over 15 years and done it well. I see no reason to doubt him now.

AWARD

Based upon the past record of disciplinary actions taken by the Department in effecting suspensions for lengths of time up to thirty days as a maximum for conduct which I believe was at least more serious than this case presents, and for all of the other reasons set forth above, I am directing that Sgt. Jack Harris' termination from employment be and it is hereby reduced to a suspension of one week (a calendar week) and that he be fully reinstated to his former position and made whole for any loss of pay and benefits suffered as a result of the action taken against him.

DATED: September 26, 1986
Los Angeles, California

JULIUS N. DRAZNIN
Hearing Officer

>HarrJ1\P.5
DTR:cab